# Advertising Law Primer

SECOND EDITION WITH FORMS

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No booklet on the subject of advertising law can be comprehensive. Nor is the booklet intended as legal advice to be relied on without the advice of competent legal counsel. We also publish comprehensive primers on the subject of copyright and trademark law. That said, we welcome your comments, criticisms and, especially, experiences.

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## I.
## Introduction

When serious claims over ads are lodged, in-house personnel and agencies are fired. Advertisers have been hit with judgments in excess of $40 million and forced to pay for corrective ads. The laws governing advertising are tools of the trade for the professional who creates and markets products and the law demands that these executives know and apply these rules of the road! Ignorance of these rules and laws is not a defense to any claim.

Laws regarding false advertising, right of publicity, trademark and copyright are the laws most often violated by advertisers. Specialized industries, such as banking, health and insurance have, in addition, their own bodies of laws.

State and federal statutes abound, and there are ample judicial decisions resulting in interpretations of laws that are accessible and generally understandable, yet every year there is a plethora of claims and suits brought over advertisements from a variety of sources and for a variety of reasons. Copyrights and trademarks are infringed and identities are used without consent. Unsupportable claims are made about advertisers' and competitors' products by careless and overzealous marketers.

Most of these unfair competition claims come from competitors offended by an ad or from those who use the legal system as an offensive marketing tool. The Federal Trade Commission, state attorneys' general and, occasionally, consumers also bring claims. Many claims come about because a competitor thinks the ad is a dirty trick or contains dishonest claims.

Trouble can also come from an unexpected source such as an unsolicited submission of creative ideas. Agencies should adopt and strictly adhere to a policy regarding these submissions.

Finally, a clearly written agency-client contract serves to protect both parties and maintain a good working relationship. This edition of the Advertising Law Primer contains copies of an agency-client contract, a policy and forms to use with unsolicited submissions, and more.

## II.
## False Advertising

Most false advertising claims arise under the federal Lanham Act, which prohibits any false or misleading description or representation of fact likely to misrepresent the nature, qualities, characteristics, geographic origin or source of a company's goods or services or those of a competitor. Also, almost every state has laws that prohibit false, or deceptive, advertising. When an ad with a false claim runs, the advertiser, agency, research firm and distributor may all be liable.

Congress, in enacting the Lanham Act in 1947 as the federal remedy for unfair competition, determined that protecting buyers from unfair competition, including false and misleading advertising, is an important goal and a laudable public policy to be served. Unfair competition is commercial dirty trickery that is not a fair and honest way of competing. Because competitors have the greatest interest in stopping misleading advertising, they were given the right to sue to rigorously enforce this statute. Under the Lanham Act, unfair competition is divided into infringement of trademarks and trade dress and false advertising.

To sue under the federal statute, a competitor must establish that a false statement of fact about its product has been made, and that:

- There is either actual deception, or a substantial number of the intended audience is left with an impression of deception.
- The misrepresentation relates to inherent quality or characteristics of the product or a fact that may have a significant impact on a buyer's decision to purchase.
- The goods are in interstate commerce.
- The competitor will suffer injury or lose goodwill.

It is important to note that there need not be any intent to deceive if the ad's message is false.

The stakes are high. U-HAUL won $40 million from a competitor truck-rental company JARTRAN, who had falsely advertised that its trucks were less expensive to rent because of better gas mileage. GILLETTE won $1 million from WILKINSON SWORD and its advertising agency for an ad falsely implying that the latter's blade gave a smoother shave. ALPO won $10 million from RALSTON PURINA over its claim that Puppy Chow reduced hip dysplasia. Damages measured by reduced sales or market share can be awarded. The cost of a corrective campaign, equal to the cost of the offending campaign, also may be awarded. In addition, the Federal Trade Commission constantly monitors and challenges the accuracy of advertising. Many advertisers have been the subject of cease and desist orders. And recently, a $3.7 million fine was levied against an advertiser who violated state consumers protection laws by making false claims about a product's ability to cure diseases.

The most important element of the offense to advertisers and competitors is the determination that the advertiser's misrepresentation of fact induced the buyer to purchase the goods, which may be implied. Imagine the economic impact on competitors of an ad that falsely claims, "the razor blade will never become dull." False advertising claims can be separated into two categories: Those that are false on their face and those that, while they are literally true, have a tendency to mislead. If a competitor establishes that the claim is false on its face, through analysis of the ad itself, it need not prove how consumers perceive the message. It has established the element of the offense.

If the competitor claims that the ad, while literally true, will mislead, it will have to prove this allegation. For example, the "blade that will never dull." What if it wasn't ever sharp? This is usually proven by survey evidence of a large enough sample of potential and actual customers. The competitor must prove that a statistically significant proportion of the intended audience was deceived or misled by the message. For instance, that they believed a blade that would not dull was sharp and would stay sharp. If evidence establishes the advertiser deliberately set out to deceive in its advertising, some courts will presume it was successful without a showing of more.

## III.
## Comparative Advertising

Comparative claims arise when the advertiser compares its products to the competition's and the advertiser claims superiority; it is not necessary that the competitor be directly named, but often this is the case. An example of a comparative claim is a recent ad by MSN that compares itself to AOL and claims to be "more useful." Unlike a copyright, the owner of a trademark does not have the exclusive right to use its trademark in advertising. Truthful comparative claims, using the mark of a competitor for comparison purposes, are encouraged by the Federal Trade Commission, an agency that also monitors such claims with an eye to eradicating false claims.

Once a claim of superiority is made, a competitor, to successfully contest the claim, must prove through its own testing or with the advertiser's data that the advertiser's product is no better, or that it is worse. An actionable comparative claim may be made by innuendo or ambiguity. Comparative ads are dangerous because they make claims about the advertiser's and the competitor's product that may prove false. They may also disparage the competitor's product. They are fraught with litigation hazards, and some insurers who write ad coverage won't cover these claims without a rider.

> TIP: Every comparative claim must be supported by independent tests or surveys. The courts may not hold lack of prior testing as proof that the claims are false, but the FTC will. Agencies and advertisers must determine that the tests and surveys are sufficiently reliable to establish the claims. When in doubt, ask for most substantiation or do not run the ad.
>
> TIP: Be certain your agency-client contract indemnifies you against claims arising out of comparative ads your client approves.

"Puffing," a very common element of advertising, is a boastful claim that is vague or grossly exaggerated. Puffing is divided into objective and subjective claims. Subjective puffing is a claim that the product is "best or better" and is legal and not actionable because no reasonable buyer will rely on these claims to make a buying decision. These claims, however, should be sincere. Objective puffing, although boastful, may be actionable because the claim may be specific and subject to verification through research--a claim, for example, that the bank is the "biggest in town" or that it has "more units sold." Claims that the product is "new," "improved" or has "new technology" are puffing.

## IV.
## Right of Publicity

No person's identity can be used in an ad without consent, which should always be written or signed. Only the smallest characteristic is necessary to identify someone. In one case, an agency violated a famous race car driver's right of publicity when it used a photo of him in his car in an ad, even though he wore a full face helmet. This result occurred because his car was identified with him. Celebrities and non-celebrities are protected. Use of nicknames, names, photos, drawings, faces in the crowd and even voice impersonators and look-alikes will be actionable if the person can be identified.

A famous person's persona, or identity, may be subject to trademark protection even where their photo or name is not used in an ad. For example, take Woody Allen and Vanna White. When readily identifiable elements of their persona were used in ads, even though photos or illustrations were not used, the ads were found to infringe on their trademark rights. Vanna's wig and jewelry on a robot left no doubt who the robot was. A nebbish-type guy with a clarinet immediately conjures up Woody Allen. These trademark rights arise because there is a likelihood that consumers will be confused into believing that the celebrity has sponsored, endorsed or is connected with the product.

The right of publicity even extends to movie roles portrayed by actors. Examples are Charlie Chaplin's Little Tramp and Spanky McFarland from Our Gang. However, Bela Lugosi couldn't protect Dracula because it was a creation of Bram Stoker, not Bela.

In a recent case, the right of publicity was ruled violated where an advertiser used a photo from a newspaper of a man arrested for a crime. And the advertiser was also guilty of defaming the subject of the photo!

The right of publicity is inheritable so death does not extinguish the right. It can survive for fifty years and more, depending on the state. In California, where the statute protects name, voice, signature, photo and likeness by a person who is the successor in interest or a licensee, there is a procedure to allow for after-death registration of the right of publicity. Under this statute a claim is registered with the Secretary of State and the purpose is to place on notice those people who would use a descendant's identity in an ad.

Not only can an ad violate the right of publicity, it can also create a false endorsement. Often the endorsement is not blatant; it is implied. This is the effect of using someone's identity in a an ad because, as with trademark law, consumers may be confused and believe that the person was affiliated with, or sponsored by, the advertiser.

TIP: Anytime a person's identity (picture, voice, name, etc.) is used in an ad, a written release must be obtained. If the release is specific, not general, care must be exercised not to violate the terms of the release. Use in newspapers does not mean the use is collateral. The Appendix contains a sample release.

## V.
## Trouble with Trademarks

A trademark is a word, symbol or device used by a seller to identify and distinguish its software and services from the competitors'. Examples are MOPAR, MONT BLANC, MICROSOFT, and MONTECRISTO. Violations of trademark laws are violations of the laws prohibiting unfair competition. Advertisers get into trademark trouble in several ways. They dilute another's goodwill in a mark through tarnishment or mere use; use similar business names; create marks that are confusingly similar to a competitor's mark; use another's mark in their ads, implying affiliation or sponsorship; they create packaging that looks a bit too much like the competitors'; and they adopt domain names that infringe another's trademark and prevent use of that mark as a domain name. Domain names can also serve as trademarks.

Trademark infringement, as a form of unfair competition, violates the Lanham Act and many state laws. Unfair competition substantially injures goodwill. Since the 1970s, the Lanham Act has been used to remedy almost all types of false advertising and trademark claims.

If there is likelihood that buyers will be misled or confused by the trademark as to the source of an advertiser's goods or services, infringement occurs. What factors determine whether a trademark has been infringed?

*Is the mark strong or weak?* Marks are categorized in descending order of strength as arbitrary, fanciful, suggestive, descriptive and generic. Fanciful marks, words that do not exist in everyday language, such as "PROXIMA" are highly protected, as are arbitrary marks, such as "MANGO" and "WIZARD" when applied to software. A suggestive mark may be "WORD PERFECT." Suggestive marks fall between arbitrary and descriptive; being neither descriptive nor suggestive. They do not indicate the nature of the goods they describe, and they are protectible. With these marks, the imagination is needed to bridge the mark and the product's attributes. However, each suggestive mark contains some description or it would fail to suggest. "NAVIGATOR" may be a descriptive mark when used with Internet software. Descriptive marks become protectible through use. After the passage of time, consumers begin to recognize that the descriptive mark refers to one particular product. Generic marks, such as "spoon" are never protected.

*Are the marks similar when each entire mark is compared?* Appearance, sound and meaning are considered. A blue box with white clouds may infringe MICROSOFT-OFFICE, regardless of what is printed on the box.

*Are the goods or services similar? Do they serve the same purpose?* It is not enough that the two products are merely software. One might be strictly commercial; the other consumer. One might be financial; the other aviation orbital. Huggies diapers sued Dougies diapers and won as the goods were identical and the marks sounded similar. The Taj Mahal casino in New Jersey sued the Taj Mahal restaurant in Washing, D.C. but lost—the marks were identical, but the goods and services were not similar.

*Do the parties distribute their product through the same channels?* Do they sell at retail in the same stores or through value-added resellers; do they sell by Internet using similar links or key words? Do they sell to commercial or non-commercial markets? These questions help to answer whether customers of one product will learn of the other product and develop confusion as to source or affiliation.

*Are the buyers sophisticated?* If the product is inexpensive, buyers are not likely to spend the time to

distinguish between two sellers. If it is very expensive, the buyer will do his or her homework, know its vendors, and not be confused by similar marks.

*Have people actually mistaken the advertisers' goods for the competitors?* It's not necessary for a case of infringement, but it's often very convincing evidence.

Last, if the advertiser adopts a mark knowing it is likely to confuse and divert sales, the courts will consider that strong evidence that the marks are similar and confusion is likely to result.

### A. Use of the Mark May Imply Sponsorship, Affiliation or Endorsement

An advertiser often uses another company's trademark or product in its ads, for a variety of reasons. For example, a ROLEX watch on a model may add sophistication to a cosmetic ad. In showing the ROLEX in its ad, the cosmetic advertiser must protect against creating a likelihood that buyers will be confused into believing that ROLEX is somehow affiliated with the cosmetic seller, or that ROLEX was paid a fee to allow use of its famous trademark.

Unfair competition may occur when an advertiser adopts a mark similar to an existing mark even though the products are in no way related. Years ago, a court enjoined the use of COMCET on computers because even sophisticated engineers might believe that the COMCET computer was related to COMSAT—the Communications Satellite Corporation—and that COMSAT had expanded its line of business. Mead Data's LEXUS division almost stopped Toyota from naming its car LEXUS.

The influential Court of Appeals for the federal district that encompasses New York said that for infringement arising from confusion to exist, the public is not required to believe that the owner of the mark actually produced and sold the goods. All that is required is that the public believe that the owner of the mark gave permission for use of its mark, sponsored the seller or is otherwise associated with the seller.

Sometimes the use of a disclaimer in the ad stating that the advertiser is not affiliated with the owner of a featured, non-related mark will avoid infringement. Some courts hold it will not, it will only highlight the problem. A dollop of common sense and an informal office poll will often assist to determine if confusion exists.

### B. Trademark Dilution

"Dilution" occurs when a famous mark is used by an advertiser even though there never will be any possibility of confusion, mistake, or deception. A federal law deals with "lessening the capacity of a famous mark to identify and distinguish goods and services...." A software company that names its product TIFFANY'S is infringing under this new law, despite the fact that TIFFANY'S will probably never sell software.

The infringed mark must be famous, and the law cites many factors to consider, among which are: extended use of the mark; broad geographical use; high level of recognition; and registration of the mark. Famous requires that persons who are not buyers of the product recognize it and its source. Even if you never buy soda, you likely know that COKE is the product of the Coca Cola Bottling Company.

Dilution can occur through tarnishment or blurring. Blurring occurs when an advertiser's distinctive mark is used on unauthorized products. KODAK televisions, TIMEX radios, and BUDWEISER clothing would be examples of blurring. Tarnishment occurs when the mark becomes linked to products of inferior quality or the mark is portrayed in an unsavory way. FUNKIN DONUTS on t-shirts infringed DUNKIN DONUTS. A condom company infringed AMERICAN EXPRESS when it adopted the slogan, "DON'T LEAVE HOME WITHOUT IT."

### C. Trade Dress

"Trade dress" is the overall appearance of a product or business. It can include Web page appearance, on-screen messages, product shape, package design, labels, the appearance of a video game console, and even the look of sales brochures and reminder letters sent out by service centers. If inherently distinctive or if it has acquired secondary meaning, trade dress is protected and a competitor who adopts a packaging or product appearance too similar to another's can become an infringer, violating the Lanham Act.

If trade dress is inherently distinctive, or has acquired secondary meaning, it is protectible; trade dress must not be functional. For example, the color pink, added to insulation, is not functional. Use of black to make outboard engines appear smaller is functional. When a trade dress is inherently distinctive, or, not being inherently distinctive, has acquired secondary meaning over time through use, consumers associate the trade dress elements with the advertiser as the source of the product. Inherently distinctive means that it is unique in its field. If the package is common in the industry, or functional, it can't be protected as trade dress. An example is the use of clamshell packaging to distinguish more expensive videos from less expensive ones packaged in a sleeve.

Where the courts examine trade dress, the focus is on the entire look of the product or package. Some elements may be similar but the test for infringement is the general impression made by the offending article on the eye of the consumer.

> TIP: Where there is more than one product in the line-up, such as a family of video cassettes, some courts require that all products must have a similar look for any one product to be protected.

### D. How to Use (or Lose) Trademarks in Advertising

A trademark registered with the federal Patent and Trademark Office and used in advertising or promotion should be identified as registered by affixing the ® symbol immediately after the mark. If the mark is not registered, or if the application is pending, the ™, or $^{SM}$ symbol should be used. $^{SM}$ applies to services; ™ to goods.

> TIP: Even before the proposed mark is used, it can be registered if there exists a *bona fide* intent to use. This process protects the proposed mark while the agency and the advertiser evaluate whether to launch the product.

> TIP: A careful search should be made by experienced counsel even before a mark is proposed to the client to avoid the client "falling in love" with a mark it cannot use. Final responsibility for legal clearance and use must be the client's.

The registration notice is not necessary each time the mark is used in the ad, but it should appear where the mark is first used or is most prominent. If ® is used, but the mark is not registered, the PTO may refuse later registration and a competitor can sue for false advertising.

If use of the mark is discontinued, the owner may lose all rights through abandonment. Non-use for three years may constitute abandonment, but shorter non-use may also forfeit rights if there is shown intent to abandon the mark. Failure to police trademark rights will also result in loss of those rights.

> TIP: An advertiser must maintain a policy of searching for uses of similar marks and demand cessation where infringement exists. Otherwise, the mark can become unprotectable. Lawyers can arrange for "watch services" and evaluate whether another's use infringes.

The F. REMY mark for brandy was held abandoned when shipments from France to the U.S. stopped for six years and REMY MARTIN, a competitor, began a massive advertising campaign using REMY. Hermès was recently precluded from stopping the sale of a competitor's knock-off handbags.

A public announcement of an intention to discontinue the sale of a certain product can result in immediate abandonment of a mark and must be carefully considered.

A mark may also be lost through genericide when the public uses a mark to designate a type of product instead of identifying a particular brand. This happened to aspirin, which at one time was a trademark of BAYER. Advertising BAYER TABLETS OF ASPIRIN killed the mark. Xerox is constantly fighting genericide.

> TIP: Use the trademark as an adjective to describe a noun. In advertising, use the mark immediately preceding the generic name of the product: LEVI jeans, for example. Also, distinguish the mark from surrounding text by capitalizing the first letter or the entire mark, or by using bold type.

## VI.
## Copyright

Federal laws grant copyright owners the absolute right, with exceptions generally not applicable to advertising, to control their original works of authorship. So when an advertisement reproduces a copyrighted work without authorization, the agency, the advertiser, and the responsible executives become copyright infringers.

Copyright protection is granted to original works of authorship fixed in a tangible medium of expression. This means only that the work was created by, or transferred to, the owner and possesses a minimal level of creativity. Almost all original works are sufficiently "creative" to obtain copyright protection. The more creative the work, the more it is protected.

Copyright protection extends to eight non-exclusive classes of works, of which the following types are most commonly infringed in advertising:

*Literary works, such as books, magazines, ad copy and articles.* Protected poems and excerpts from articles and magazines often turn up in ads.

*Musical works.* Ads often lift protected parts of songs. Television, radio and Internet make music infringement easy. Think "Happy Birthday" is available for use? Think again; it is not. There are source books that list all music works in the public domain and available for use without consent. *Public Domain Report Music Bible* is one. To obtain a copy, call 1-800-827-9401.

*Pictorial, graphic and sculptural works.* Photos, art, and design are often infringed. Even another's ad can be infringed if its protected elements, or look and feel, are taken. An example is a print ad for a beverage, shot at New York's Village Vanguard that was similar to a photo by the renowned photographer, Kisch. Although the ad was in color and used a male model holding a saxophone and the black-and-white Kisch photo posed a female holding a concertina, the setting, the mood, camera angles and positions were very similar and the ad was held to infringe. Often a photographer or illustrator will license his or her creative work for a single, one-time use only. Be certain you have acquired all rights if you intend to reuse the creative work in a second ad or a brochure.

> TIP: If the work is created by an employee of the agency, the copyright is owned by the agency and can be transferred to the client upon payment. But if the work is created by a third party vendor, the vendor owns the copyright until it transfers ownership to the agency in writing.
>
> TIP: Be careful when you contract with the client for transfer of ownership of all creative. If the work was created by a third party vendor, the agency can't transfer ownership unless it first acquires ownership.

As to works acquired by an agency, the Purchase Order included in the Appendix contains important language regarding transfer of ownership (¶2), use of the work (¶3), and warranting that the work does not infringe the rights of others (¶4).

### A. Not Protected

Ideas, procedures, processes, systems, methods of operation, and principles or discoveries are not protected by copyright law. The idea of a play or movie about a repeating day or a superhero can't be protected. But once created, the particular expression will be protected.

Copyright does not protect short phrases, slogans and titles. Nor are facts and works that are purely utilitarian copyrightable. Scientific works, based on facts, are protected, but less so than art, music, literature, photographs and illustrations.

Slogans, while not protectable under copyright law, may be protected under trademark law.

### B. Copyright Infringement

Infringement occurs when an ad reproduces, without authorization from the owner, a copyrighted work. A photo or illustration used without consent becomes costly; often three times what the original license fee would have been, although in certain instances the law may allow recovery of $150,000 and attorneys' fees. An advertiser cannot modify a copyrighted work. A new work based on an existing work is called derivative, and to create a derivative work the advertiser must have permission. An example is a photo used in a collage, a script based on a short story, or modified music or lyrics.

The first hint of infringement is receipt by the advertiser of a cease-and-desist letter. Unless a license can be arranged, the advertiser must voluntarily pull the ad or a court is likely to order the ad pulled. The owner will demand payment of its damages or the infringer's profits; damages may be the cost of creating the copyrighted work or the royalties it would have earned if the work was properly licensed. Copyrighted work used in advertisements commands higher license fees. If the author has registered the work with the Copyright Office within ninety days of the date it is first published or prior to the infringement, penalties of up to $150,000, called "statutory damages," and attorneys' fees may be assessed by a court.

Advertisers sometimes parody another's ad. A parody makes fun of the original and is "fair use" of the original work. Coors beer got away with parody despite a suit by Eveready when actor Leslie Nielson dressed as the Eveready Bunny and hopped across the commercial. The court said that Nielson only took the minimal amount necessary to conjure up the image of the original. But determining how much is enough, and where the line exists, is very dicey as there are no bright lines. Satire is not a fair use.

> TIP: Satire occurs when a protected work is infringed to make fun of an unrelated subject. The use of the rhymes of a Dr. Seuss book to make fun of O.J. Simpson was an infringement and not fair use.

## VII.
## Speculative or Unsolicited Creative

Agencies should protect themselves when they submit speculative creative in an attempt to obtain a new account. Even though the copyright law provides protection once a work is created, it is a great idea to add the agency's copyright notice at the bottom of the creation (©, 2002 B.I.G. Agency) and register the work with the Copyright Office. It is also a good idea to send a letter with the creative advising that until hired, the agency retains all rights in the submission. Then, if the prospective client still uses the work, the infringement is willful and damages are higher. A form letter that accomplishes this is included in the Appendix.

Agencies have run into trouble after they receive unsolicited creative material, and the submitter thinks the material was used in a subsequent ad. It is a good idea to adopt and adhere to a policy whereby only non--creatives are exposed to unsolicited material until the submitter has signed the agency's form and resubmitted the material with this form. A copy of a policy and forms are included in the Appendix. Better yet is the return of all unsolicited submissions without review and without an instruction to resubmit.

## VIII.
## Digital/Website Issues

In this digital age, it would be remiss of me not to mention that the sale or license of computer information (a website, digital photos, digital art, etc.) is governed in Maryland and Virginia by a new uniform law called UClTA. Discussion of UCITA's vast implications are beyond the scope of this Primer, but it is good to know that a vendor can elect to forgo the applicability of this law.

Finally, while a comprehensive discussion is also beyond the scope of this Primer, take care in creating

websites that "frame" the web pages or images of another. These tactics have been the subject of legal actions in the past and one search engine that framed was found to be a copyright infringer. Extensive use of metatags and trademarks to draw persons to a website may also be actionable as unfair competition. Agencies who abide by AFTRA/SAG agreements should also be careful in adopting TV commercials for website use, including their own, as these uses may not have been bargained for.

## IX.
## Sweepstakes

Sweepstakes and lotteries have a lot in common except sweepstakes are legal and lotteries are usually criminal. A lottery has these three elements: chance, consideration, and prize. A sweepstakes has only chance and a prize. The difference between the two is that to enter a sweepstakes, the advertiser cannot require payment or the purchase of a product ("consideration") although in most states, but not all, a contestant can be required to appear at a store to enter the contest. In Georgia, however, a contestant cannot be required to visit a location to receive the prize.

> TIP: The existence of a sweepstakes is often publicized by internet to a wide audience, often wider than the sponsor intended. If your client is regional and you only want entries from that region, your rules must say so.

> TIP: Sweepstakes must be taken seriously so don't joke about the prize. One sponsor found itself on the wrong end of a law suit when it offered a Harrier jet as a prize and the prize was claimed. "I was only kidding," doesn't cut it.

## X.
## Conclusion

Advertising and marketing executives are professionals, and by definition they must be worthy of the high standards of their profession. It is not enough that they merely produce ads that sell; the ads must be created within rules that govern the profession. It is the real professional who is able to consistently win while abiding by the laws and rules that govern all members of the profession.

## XI.
## Appendix

### A. Model Release

For valuable consideration, the receipt of which I acknowledge, as payment in full for my services as model and for permission herein granted, I hereby irrevocably assign to _____ and its client named below, its agents, licensees and assigns, all of my right, title, and interest in the photographs identified below, for use in whole or part or in conjunction with other photographs, in any medium and for any lawful purpose, including illustration, promotion or advertising, without any further compensation to me.

I waive any right to notice approval of any use of the photographs which _____ and its client named below may make or authorize and I release, discharge and agree to save harmless _____ and its client named below, its agents, licensees and assigns, from any claim or liability in connection with the use of the photographs as aforesaid or by virtue of any alteration, processing or use thereof in composite form, whether intentional or otherwise.

The photographs and negatives are your sole property.

You will act on this consent very quickly, so it is irrevocable.

PHOTOGRAPHS:

Consideration: $_____

Client: _____

Description(s):_____

Date(s) Taken:_____

Photographer: _____

MODEL: I am over eighteen (18) years of age.

Signature: _____

Print name: _____

FOR MINOR: I am the father/mother/guardian of:

_____

For value received, I consent to the foregoing on his/her behalf.

Signature: _____

Print name: _____

WITNESS:

Dated: _____

Signature: _____

## B. Use of Speculative Creative

[AGENCY LETTERHEAD]

Dear _____:

Thank you for providing us with the opportunity to present our agency's creative product and ideas in this review for your account. Our creative effort is our stock in trade and while we enjoy working hard and presenting you with our best work with the expectation we will win your business, we also need your agreement on how our creative product and presented ideas will be used after the review.

If we are the lucky recipient of your account, you are free to use our creative product and ideas as you see fit to direct us to proceed, all in accordance with whatever agreement we sign.

If, regretfully, we are not awarded your account, of course we will respect your decision, but we must require that our creative product not be used by you or your agency. As we use the term creative product in this letter, we mean the illustrations, copy, art, photographs, layout and concept and feel of our creative product, or derivatives or portions of the foregoing, many of which components are protected by United States and international copyright laws.

In addition to the creative product, you agree not to use our ideas behind the creative product whether or not communicated to you in writing or orally. These ideas may be no more than a general statement of the strategy, or more detailed tactics, but if we communicate them to you, they are protected under the terms of this letter. We hope you realize that even a general statement of strategy is the result of extensive time and effort spent by us on your behalf.

Payment for our creative product or ideas will not compensate us for the harm incurred by using our creative product or ideas in a fashion not permitted by the terms of this letter.

Before we can proceed, we ask that you please sign and return to us a copy of this letter. If you have any questions, please telephone. We trust you will understand our reasons for this letter.

AGENCY
By:_____

AGREED AND ACCEPTED
THIS _____ day of _____, 200_
COMPANY

_____
By:_____
Name:_____

**C. Statement Of Policy**
**RE: Unsolicited Submission**

[COVER LETTER]

Dear _____:

We appreciate the interest of our listeners and professional people who suggest ideas and material, including programs, formats and literary works for our use, but we do receive many suggestions that duplicate submissions of others, including members of our staff. And we may even start using materials or exploit ideas similar to yours that we receive after the date of your submission.

So we must adopt a policy of refusing to consider any materials or ideas unless the person submitting it signs the agreement appended to this statement, which specifies the maximum payment he or she is to receive from us if we use the material or idea. Please do not submit any material that you deem to have a value in excess of the maximum payment.

We must therefore return your material, unreviewed. If, however, these terms are agreeable to you, please sign and return one of the two copies of this form, and resubmit your materials to: _____.

Sincerely,

_____

## D. Agreement RE: Unsolicited Material

Dear _____:

I have read your statement of Policy and I agree to have you or your staff evaluate my idea or material ("material") for suitability of use by you subject to each of the following:

1. You, or your staff, will evaluate my material which I hereby submit.

2. You may use my material or any component of my material. If you do use my material, and if it is original and novel, you will pay to me as total compensation therefore, an amount that we subsequently agree to in writing, but if we have not attempted, or are not able, to agree to such sum and you start to use my material, you will pay to me and I will accept as full payment for all rights of every kind in the material, including copyright and the right to create derivative works therefrom, the sum of $ _____.

3. I acknowledge to you that any liability you may have to me arising out of your use of the material will for no reason whatsoever exceed the forgoing sum.

4. I have provided to you all the important features of my material along with my submission. I warrant that the material is original to me and no third party, to the best of my knowledge and belief, has any right in or to it.

5. I also am aware, and I acknowledge, that other people, including your staff members, may have submitted materials to you that are similar or identical to my materials. And, I recognize that similar materials may have been made public by other persons. I realize that I will not be entitled to any compensation because of your use of such similar or identical material.

6. If any controversy or disagreement arises with respect to any of the subject matter of this agreement, resolution shall occur only through binding arbitration through the American Arbitration Association conducted before a panel of three arbitrators in Baltimore, Maryland, with the prevailing party to be reimbursed by the other for all costs associated with the arbitration. The substantive laws of Maryland shall apply.

7. Lastly, this writing is our complete understanding and agreement and can only be changed in writing.

_____(SEAL)
Submitter

_____
Address

_____
Date

_____

## E. Internal Policy Regarding Unsolicited Submission of Material

1. All staff persons are instructed to route any submission to one senior staff person who has no responsibility whatsoever for creative development.

2. The mailroom, or the recipient, logs the submission in by date, time, with the senior staff person.

3. The senior staff person notes the name and address of the submitter in the log, and returns the submission along with the External Policy statement and form agreement.

4. If the form agreement is acceptable to the submitter, he or she can resubmit the material.

## F. Agency Agreement

Gentlemen:

We are very pleased to serve as your advertising agency with respect to your product(s), _____, in the United States in accordance with the terms of this Agreement:

1. NATURE OF OUR SERVICES.[1] During the term of this Agreement, we will undertake to use all reasonable efforts on your behalf to render the services set forth on Schedule A to this Agreement.

2. MUTUAL EXCLUSIVITY. During the term of this Agreement we will not act as advertising agency for any product(s) or service(s) that is directly competitive with the products(s) or service(s) assigned to us by you, without your consent. In return, during the term of this Agreement, you will not engage any other advertising or public relations agency or entity providing similar services without our consent.

3. WE ACT AS YOUR AGENT. Our relationship is governed by your authorization of us to act as your agent in our dealings with third parties, on your behalf, to fulfill our obligations to you under this Agreement. Accordingly, we shall advise third parties that when materials and services are acquired, ownership vests in you in consideration of your payment therefor.

4. COMPENSATION. We will be compensated for our services as follows:

   a. On all space and facilities purchased and talent engaged by us on your behalf, with your authorization, we shall bill you at the published rates or negotiated rates, as may be applicable, for space and facilities and at the authorized engagement rate for talent, plus any taxes, insurance, pension and welfare fund contributions, etc., applicable thereto. (You recognize that we are a signatory to collective bargaining agreements with Screen Actors Guild and American Federation of Television and Radio Artists and that the hiring of talent by us on your behalf, if any, will be subject to the terms of such agreements.)[2]

   b. If no agency commission is granted or allowed to us on purchases of space or facilities or engagement of talent, or if such commissions would be less than fifteen percent (15%), we shall invoice you an amount which, after deduction of our cost, will yield us fifteen percent (15%) of such amount as agency commission.

   c. On art work, engravings, type compositions and any and all art and mechanical expenses incurred by us, pursuant to your authorization, we shall invoice you an amount which, after deduction of our cost, will yield us fifteen percent (15%) of such amount as agency commission.

[1] In lieu of the language of Paragraph 1, you may use: "We will undertake to use all reasonable efforts on your behalf to provide to you advertising services customarily rendered by a full-service advertising or public relations agency."
[2] Insert this language, if true. If you are a member of the AAAA, you may be deemed a signatory to the SAG/AFTRA union contracts.

d. In addition to the above compensation you will pay us, for our services to you, a fee of _____ Dollars ($_____) per year, payable in equal monthly installments of _____ Dollars ($_____) on the first day of each month during the term of this Agreement.[3]

e. If we undertake, at your request, special assignments such as market, product or distribution research, or other research (with the exception of research for copy development testing purposes), or special assignments such as market counseling or sales meeting presentations, the charges made by us will be agreed upon in advance whenever possible. If no agreement was made, we shall charge you at our standard rates for work performed by us. In addition, for materials or services purchased from outside sources under your authorization, we shall invoice you an amount which, after deduction of our cost, will yield us fifteen percent (15%) of such amount as agency commission.

f. You will reimburse us for such cash outlays as we may incur, such as forwarding and mailing, telephoning (long distance, but not to you), and travel (but not to or from you), in connection with services rendered in relation to your account.

5. BILLING AND PAYMENT PROCEDURES.

a. We shall invoice you for all media costs sufficiently in advance of our payment date to media to permit prepayment by you to enable us to take advantage of all available cash discounts. Bills estimating costs may be preliminarily used, and final bills will be reconciled and submitted as available.

b. The cost of production materials and services shall be billed by us upon completion of the production job, or—if cash discounts are earnable—upon receipt of supplier invoice.

c. On all outside purchases other than for media, we shall attach to the invoice proof of billed charges from suppliers.

d. All cash discounts on agency purchases including but not limited to media, art, printing and mechanical work, shall be passed on to you provided our billing terms are complied with and there is no overdue indebtedness at the time of payment to the vendor.

e. Rate or billing adjustments shall be credited or charged to you on the first billing date after we have been invoiced or as soon as otherwise practical.

f. All invoices shall be rendered on or about the first day of each month.

g. Invoices shall be submitted in an itemized format.

h. All invoices are payable within ten (10) days of receipt. Invoices not paid within thirty (30) days of receipt may be charged at the rate of prime plus three percentage points (3%) per annum

[3] Use this if you will charge a fee in addition to commissions.

interest. For purposes of this section, the prime rate used shall be the prime rate set by Bank of America on the first days that such invoices become overdue.

i. If you do not pay outstanding amounts due to us and we refer your account to an attorney for collection, you will pay our costs and attorneys' fees for such action, whether suit is brought or not.

j. We reserve the right to change these payment terms if there is any impairment of your credit that, in the reasonable opinion of our accountants, might endanger future payments to us.

6. COMMITMENTS ON YOUR BEHALF TO THIRD PARTIES.

a. All purchase of space and facilities with respect to the advertising of your product(s) and service(s) shall be subject to your prior approval.

b. If you should direct us to cancel or terminate any previously authorized purchase, we shall promptly take appropriate action. You hold us harmless for any costs incurred by us as a result.

c. You are disclosed principal and we shall act solely as your agent and media orders shall so provide. As between you and us, notwithstanding any contracts we may enter into with third parties in our name, you are solely responsible for obligations that we incur on your behalf with third parties until you have paid us therefor, after which we shall be solely responsible.

d. We will use reasonable efforts to supervise media to guard against any loss to you through their failure to properly execute their commitments, but we cannot be held liable to you for their failure.

e. Use of art work and photographs acquired on your behalf from third parties are normally licensed for use in designated territories and for specific purposes of time or usage. You will advise us if you want to purchase this art or photographs outright for unlimited use and we shall endeavor to negotiate a price therefor for your prior approval.

7. INSPECTION OF BOOKS. Any and all contracts, correspondence, books, accounts and other sources of information relating to services performed on your behalf upon reasonable prior notice shall be available for inspection at our office by your authorized representatives during ordinary business hours.

8. SAFEGUARDING OF PROPERTY.

a. We shall take all reasonable precautions to safeguard any of your property entrusted to our custody or control, but in the absence of gross negligence on our part we shall not be responsible for any loss, damage, destruction, or unauthorized use by others of any such property.

b. We shall not be responsible for the return of materials submitted to media after their use in publications unless you specifically request their return before they are sent to the media.

9. TERM OF AGREEMENT.

a. The term of this Agreement shall continue in full force and effect until terminated by either party upon written notice of such intention given ninety (90) days in advance, but in no event may this Agreement be terminated effective prior to the expiration of _____(__) months from the commencement of the term. Commencement of the term shall occur when we both execute and deliver to the other a signed copy of this Agreement. Notices shall be deemed given on the day of mailing, or in the case of notice by facsimile, on the day it is telephoned.

b. Our rights, duties and responsibilities shall continue in full force during the period of notice, including the ordering and billing of advertising in print media whose closing dates fall within such period.

10. RIGHTS UPON TERMINATION.

a. At the termination of our Agreement we will deliver to you copy, art work, plates or other property belonging to you which may be in our possession upon payment of all outstanding invoices.

b. We will give all reasonable cooperation toward transferring with approval of third parties in interest, all contracts and other arrangements with advertising media or others, for advertising space and facilities and all rights and claims thereto and therein, upon being duly released from the obligation thereof. You, or your new agency must comply with all AFTRA/SAG requirements regarding transfer of liability to pay talent before we are obligated to release materials embodying talent.

c. Upon termination, no rights or liabilities shall arise out of this relationship, regardless of any plans which may have been made for future advertising, except that any uncancelable contracts made on your authorization and still existing at termination hereof, which contracts were not or could not be assigned by us to you or someone designated by you, shall be carried to completion by us and paid for by you in the manner described in Paragraph 4, above.

11. INDEMNIFICATION.[4] Except as is otherwise provided below, you will indemnify and hold us harmless from and against any liabilities and expenses (including attorneys' fees) reasonably incurred by us in respect of any action or proceeding brought or threatened to be brought before any court, administrative body, or other tribunal, which action arises out of the services rendered by us hereunder including, without limitation, liabilities and expenses arising out of claims with respect to advertising prepared by us.[5]

The preceding paragraph notwithstanding, we agree to indemnify and hold you harmless from and against any liabilities and expenses (including attorneys' fees) reasonably incurred by you in respect to

[4] Use this clause if you have advertisers' and agencies' liability insurance. If you do not have such insurance, use the following paragraph 11.

[5] Alternate Paragraph 11: We agree to exercise our best judgment in the preparation and placing of all advertising and publicity for you, with a view to avoiding any claims, proceedings or suits being made or instituted against you or ourselves. It is mutually agreed, however, that you indemnify us against any loss we may incur as the result of any claim, suit or proceeding made or brought against us based upon any advertising or publicity that we prepared for you and that you approved before its publication or broadcast.

any advertising materials prepared by us for you that give rise to any claim pertaining to libel, slander, defamation, copyright infringement, invasion of privacy, piracy and/or plagiarism covered by the then terms and conditions of any advertisers' liability insurance policy wherein we are named insured.

12. MATERIALS AND IDEAS. During the term of this Agreement we will not retain for the benefit of ourselves or disclose to any third party (unless required by law, court order, or relevant regulation) any of your Trade Secrets, as defined in the Maryland Uniform Trade Secrets Act, Section 11-1201 of the Commercial Law Article of the Annotated Code of Maryland.

13. GOVERNING LAW.

a. This agreement shall be interpreted in accordance with the laws of the State of Maryland. We both consent to jurisdiction and venue in the State and Federal courts of Maryland if any controversy shall arise hereunder.

b. This letter contains the entire agreement of the parties, and may not be modified unless signed by an authorized officer/representative of both parties.

c. The failure of either party to insist, in any one or more instances, upon a strict performance of any of the covenants contained herein shall not be construed as a waiver or a relinquishment for the future of such covenant, and the same shall continue in full force and effect.

If the above accords with your understanding and agreement, kindly indicate your consent hereto by signing in the place provided below.

Very truly yours,

By:_____

ACCEPTED AND AGREED:

BY:_____(SEAL)

Date:_____

_____
(Witness)

## G. Purchase Order Terms and Conditions

_____ ("Agency") will purchase as an agent for its client named on the front of the Purchase Order ("PO"), and you ("You") will deliver material, services or products, which may include original works of authorship, from time to time and more particularly as is described herein (the "Work"), in strict accordance with these Terms and Conditions:

1. Payment for the Work covered by this PO will be made after signing of PO, and completion and receipt of the Work unless otherwise agreed to in writing by Agency.

2. If the Work is copyrightable subject matter, and if the Work is of a category that can be considered a work made for hire by an independent contractor, You expressly agree that the Work shall be a work made for hire and the property of Agency or its client. Endorsement by You of any check made in payment hereunder and/or signature by You on this PO, shall constitute a writing or a written instrument between You and Agency under 17 U.S.C. Section 101 that the Work is considered a work made for hire. You also agree to sign such acknowledgement, evidencing our agreement that the Work is to be considered a work made for hire, at a later time at the request of Agency or its client, If the Work is not a work made for hire, You hereby grant and convey all right, title and interest to the Work, including copyright, to Agency or its client. Endorsement by You of any check made in payment hereunder and/or signature by You on this PO shall be a conveyance and an instrument of conveyance under 17 U.S.C. Sections 201 and 204. You also agree to sign such acknowledgement, evidencing our agreement that You intend to transfer ownership of the copyright to Agency or its client, at a later time at the request of Agency or its client. If You are not considered the owner of the rights conveyed, then You represent and warrant to Agency and its client that You are the authorized agent of the owner, and that you can execute this conveyance of ownership.

3. Agency's and its client's rights include, but are not limited to: (a) the right to use the Work in such manner as they shall determine, without limitation, including use in advertising and for the purposes of trade and publication; (b) the right to alter or rearrange the Work; (c) the right to secure copyright therein; (d) the right to sell or otherwise exploit, assign or dispose of the Work or any of the said rights included therein; (e) the right not to use the Work; and (f) any and all subsidiary rights therein. You waive any rights, if any, granted by the Visual Artists Rights Act of 1990 and the Digital Millennium Copyright Act with respect to attribution, modification of the Work and copyright management information.

4. You warrant to Agency and its client that: (a) no third party has any rights in, to, or arising out of, the Work; (b) You have full right and power to enter into this PO and that these terms shall bind You, Your successors and assigns, employees and, in the case of individual, Your heirs and legal representatives; (c) all models and other living person, or the representative or owners of the rights of identity or publicity of any deceased persons having rights of publicity, and the owner of any unique or unusual inanimate objects which are used in the Work, have executed full and perpetual release and that upon request You shall supply Agency with copies of the releases; (d) all materials which are incorporated in the Work are free from any adverse rights or claims therein; (e) the Work complies or will comply with Agency's specification, and be free from defects in material, design or workmanship; and (f) the Work and each part thereof, does not infringe on the property rights, including but not limited to, copyright or right of publicity or to privacy, of another.

5. You will indemnify and hold harmless Agency and its client, and their respective assigns, clients, successors and licensees, from and against any loss, damage or expense, including court costs and attorney's

fees, that they may suffer or incur as a result of any breach of the foregoing warranties or of any kind or nature resulting from the use in any manner of the Work, including, without limitation, artwork, negatives, photographs and dies furnished by You. Any costs or expenses incurred by Agent or its client to enforce the terms of this PO, including attorneys' fees, shall be paid by You, and any actions arising out of this PO shall be brought in a Maryland Court and shall be governed by Maryland law. Sums due shall bear the legal rate of interest from the date they were due.

6. Agency may reject and not pay for Work not delivered in strict accordance with specifications of this PO, including timely delivery, which is of the essence. Complaints, or notice of defects in workmanship or designs of the Work, if they exist, or notice of rejection of Work, will be provided to You promptly after Agency has reviewed the Work.

7. These terms are our entire agreement. Performance or partial performance by You is acceptance of these terms even if a signed PO is not returned. No oral PO or other understanding shall modify or change this PO unless written and signed by Agency's authorized representative. Unless an estimate, this PO is at the price specified herein, and Agency will not recognize any claim for an increased price, unless approved by Agency, in writing, prior to the commencement of, or during the course of, completing the Work, If an estimate, the finished price may not exceed the estimate by 10% unless agreed to in writing by Agency. No extra charge will be allowed for packing, crating, transportation or storage without the prior written consent of Agency.

8. Agency may cancel this PO prior to its acceptance of the Work, upon written notice to You, If canceled, Agency will pay You, in lieu of the price specified in this PO, the direct non-cancelable costs and any direct non-cancelable committed costs including overhead and personnel costs incurred by You, in the performance of Your obligations hereunder prior to such cancellation, but not more than the price specified in this PO.

9. No direction provided You by Agency during Your fulfillment of this PO shall be considered a change of project specifications or shall justify a change in the agreed cost unless agreed to, in writing, by an authorized representative of Agency. The agreed price includes any sales or use taxes which may apply to this purchase and You will be solely liable for payment of any sales or use taxes required by Federal, State or local laws.

10. You will not disclose, release, reveal, publish or otherwise make available to others, or authorize any person or entity to disclose, release, reveal, publish, disseminate or otherwise make available to others, or use for Your own purposes, any information of a proprietary or confidential nature concerning Agency or its clients, or their business, learned by You in the course of fulfilling this PO, regarding, but not limited to, trade secrets and confidential information, advertising materials, ideas, plans, techniques, and products.

11. (a) This PO, or any sums payable hereunder, may not be assigned by you.

(b) Agency shall have the right to audit Your records which pertain to the Work supplied on a cost plus basis during ordinary business hours on not less than two (2) days prior notice.

(c) Your warranties, representations and agreement to maintain confidentiality shall survive delivery, inspection, acceptance or payment by Agency. All claims for monies due or to become due from

Agency shall be subject to deduction by Agency for any set-off or counterclaim arising out of this or any other PO from Agency to You.

(d) In the event of any proceedings, voluntary or involuntary, in bankruptcy or insolvency by or against You, Your inability to meet Your debts as they come due or in the event of the appointment of a receiver or trustee, Agency shall be entitled to cancel any unfulfilled part of this PO without liability therefor.

(e) Anything to the contrary in this PO notwithstanding, Agency is authorized to, and does in fact, act as agent in the acquisition of the Work for the client named on the front of this PO and Agency represents to You that it is so authorized to act. Accordingly, Agency is not liable to You for payments to be made hereunder until after the client has paid Agency, and before such time as payment is received client shall be liable for payment hereunder. To the extent of rights acquired hereunder, these rights shall vest in Agency's client upon purchase from You.

(f) In the event that any terms established, or desired to be established, by You are inconsistent with the terms of this PO, this PO shall govern. Also, any subsequent dealings between Agency and You, if not subject to a written PO, shall be deemed to be governed by the Terms and conditions of this PO which You hereby acknowledge, until such time as Agency shall, in writing, cause these Terms and conditions to be amended.